DOCUMENT RESUME

ED 205 949 CS 206 266

AUTHOR Hodge, John L.
TITLE Democracy and Free Speech: A Normative Theory of Society and Government.
PUB DATE Aug 81
NOTE 65p.: Paper presented at the Annual Meeting of the Association for Education in Journalism (64th, East Lansing, MI, August 8-11, 1981).

EDRS PRICE MF01 Plus Postage. PC Not Available from EDRS.
DESCRIPTORS *Court Litigation: *Democracy: *Freedom of Speech: *Journalism: *News Media: Social Systems: *Theories
IDENTIFIERS *Media Role: Supreme Court

ABSTRACT

Noting that the nature and value of free speech depends on the norms and goals of a society and on that society's appropriate form of government, this paper presents a normative theory of democracy and from that theory formulates a theory of free speech. The first section defines a number of terms used in the paper and clarifies several of the underlying concepts of the theory. The second section of the paper outlines the normative theory of democracy and the theory of free speech based upon it. The final section considers the consequences of that theory in relation to three recent United States Supreme Court decisions concerning free speech. (FL)

****
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
****

ED205949

U.S. DEPARTMENT OF EDUCATION
NATIONAL INSTITUTE OF EDUCATION
EDUCATIONAL RESOURCES INFORMATION
CENTER (ERIC)

This document has been reproduced as received from the person or organization originating it.

Minor changes have been made to improve reproduction quality.

• Points of view or opinions stated in this document do not necessarily represent official NIE position or policy.

Democracy and Free Speech: A Normative Theory of Society and Government

by John L. Hodge
668 Church St.
San Francisco, CA 94114

"PERMISSION TO REPRODUCE THIS MATERIAL IN MICROFICHE ONLY HAS BEEN GRANTED BY

John L. Hodge

TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)."

CS206266

Democracy and Free Speech: A Normative Theory of Society and Government

Perhaps the most important message of Alexander Meiklejohn's approach to the issue of free speech is that an adequate theory of free speech requires as its foundation an overall conception of society and government. The nature and value of free speech depends on the norms and goals of a society and on that society's appropriate form of government. Meiklejohn's starting point was to express the social goal of this society in terms of the ideal of democracy which he defined, in essence, as "self-government."[1]

This paper too will accept as its starting point the notion of democracy as self-government. It will present a theory of democracy and from that theory formulate a theory of free speech. Some of the practical consequences of that theory of free speech will be shown by examining a few cases decided by the U.S. Supreme Court.

An adequate presentation of a theory of democracy requires a high degree of precision of language, and ambiguity is a major pitfall for any theory. The ambiguities inherent in language make absolute precision impossible, but precision of usage is nonetheless a desirable and useful goal. Thus, in Part I of this paper

I will consider some of the terminology to be used here and will attempt to clarify some of the underlying concepts upon which the theory rests. In Part II I will present a normative theory of democracy and a normative theory of free speech based upon it. In Part III I will consider the consequences of the theory in relation to some illustrative cases decided by the Court. Some further clarification of the theory will result from examination of these cases and from the application of the theory to them.

A major feature of this paper is that it will raise more questions than it answers. Many of the important implications and ramifications of the theories presented here will not be considered. More will be left to accomplish than will be accomplished. A primary goal of this paper is to present the view that a theory of society is necessary for an adequate theory of free speech; the argument for this proposition is in the form of an illustration which shows how a particular theory of free speech is related to a particular theory of society. It is hoped that the illustration presented here will provide a foundation for answering many of the questions left unanswered.

PART I: TERMINOLOGY AND DEFINITIONS

A. Normative Theory

This paper presents a normative theory of society. I use the term "normative theory" to refer not to existing rules of behavior but to behavior which ought to exist.[2] Thus a normative theory of society must be distinguished from a theory of social or political science. The former concerns questions of values. The latter concerns matters of fact. The procedure which is appropriate for determining the acceptability of the former is radically different from the procedure appropriate for verifying the latter. The procedure for verifying the latter has been generally accepted to be the method of science. The procedure for determining the acceptability of the former has not been agreed upon or fully understood.[3] It is not the purpose of this paper to examine the grounds for the acceptability of normative theories, though this issue is indeed a crucial one. For the purposes of this paper, the acceptability of the theory I will present may be viewed as dependent upon the extent to which it is soundly based in some generally accepted notions of democracy.

It is important to carefully distinguish the two kinds of theories so that refutations which are appropriate for one are not assumed to be appropriate for the other. A theory concerning matters of fact can be refuted by showing that the facts do not accord with a deduced consequence of the theory. A theory which attempts to explain the underlying basis of the Court's decisions in the area

of free speech would be a theory dealing with matters of fact. If the theory correctly explains the Court's decisions in all of its free speech cases over a specified period of time, then the theory has much to recommend it. But if the theory purports to explain all of the Court's decisions during a specified time period, and someone discovers a decision during that period which is contrary to the decision which would have been made were the theory correct, then the theory has been refuted. A simple fact refutes a theory that predicts that the fact should be otherwise.[4]

The "refutation" of a normative theory, in contrast, depends on its relation to a much broader body of experience, perhaps including sentiment and feeling, and the precise nature of this relation remains the subject of considerable debate. But no simple fact can refute it. That is because a normative theory is a statement of what ought to be, not of what is. "The whole point of a normative social theory is that it is introduced to change the de facto situation at least in part, rather than to conform to it. It defines the ideal society at which we are aiming. It does not purport to designate, after the manner of a theory in natural science, the de facto state of affairs which we actually have."[5]

Since this paper is presenting a normative theory of society and a normative theory of free speech, it is not a refutation of that theory to show that it conflicts with an existing fact situation. The only "fact" which clearly refutes a normative theory is a "fact" of impossibility. If it can be demonstrated that the ideal society presented by a normative social theory is a complete impossibility, then that "fact" of impossibility refutes the

normative theory.[6] This possibility of refutation is based on the assertion that "ought" implies "can."[7]

Thus if a normative theory of free speech conflicts with the existing body of law, that in itself can provide no adequate basis for rejection of the normative theory. That conflict only raises the question of which is to be preferred, the existing law or what the law would be if the normative theory were fully implemented.

Conflicts between the normative theories presented here and the existing body of law are to be expected. Where such a conflict exists, the question is raised of whether there is an alternative normative theory which (1) provides an adequate basis for the existing law and (2) is to be preferred. The current problem with the existing law in the area of free speech is that there seems to be no consistent normative theory underlying it.[8]

B. Free Speech

I shall use "free speech" in this paper not to refer specifically to the Speech Clause of the First Amendment, but to refer to the general issue of <u>freedom of communication</u>. It is not necessary for the purposes of this paper to discuss the possibility that the Speech Clause and the Press Clause are separable and should be treated differently.[9] The phrase "freedom of communication" is to be preferred over the often used generic term "freedom of expression." "Communication" more clearly suggests the involvement of a speaker and a listener. When we speak of a "right of free speech," we must

consider the rights of both the speakers and the listeners. The term "expression," on the other hand, suggests that the primary focus should be on the speakers. What we conclude about the relative rights of speakers and listeners is another matter.[10] We should avoid suggesting a preference at the outset by our choice of language.

The phrase "freedom of communication" also suggests that the relevant issues concern the interactions among peopde, not simply the acts of isolated individuals. The social nature of the issue is directly and correctly implied by this choice of words. That there is a relation between the rights of individuals to engage in communication and the rules and laws governing social interactions need not be mysterious or obscure. Thus, when used in this paper, the phrase "free speech" is to be understood to be synonymous with "free communication."

C. Liberties, Rights, Privileges, Duties

The terms "freedom" and "liberty" are somewhat ambiguous. When they refer to a legal relationship, some clarification can be obtained by using instead the terms "rights" and "privileges" in their Hohfeldian senses.

"Freedom" and "liberty" are often used to mean "absence from constraints." Yet, the contexts in which they are often used make it clear that "absence of constraints" does not exist. For example, the term "freedom of speech" may be used to mean a general absence

of constraints or to mean only an absence of legal governmental constraints. But it is not clear why "freedom" should be used to refer to a situation in which one form of constraints does not exist, while another form, equally constraining, does. For example, under existing law a private employer (that is, where there is no "state action") may fire an employee based solely on the latter's political speech.[11] Thus "freedom of speech" does not refer to a general freedom but only to a particular freedom against governmental constraint (and that with qualifications). By correctly using the terms "rights" and "privileges" (in their Hohfieldian senses) we are forced to specify against whom or what the right or privilege exists.

There are continuing controversies about the precise Hohfeldian meaning of these terms, but for our purposes here it will be sufficient to base our definitions on two commentaries by A. Cullison.[12] Only three terms need to be defined here: right, privilege, and duty. Each of these terms has meaning only in relation to three elements: A right (or duty, or privilege) is (1) held by a person or institution (2) against or to a person or institution (3) relative to the occurrence of an act or situation. Thus: P_1 has a right against P_2 that A_1 occur; P_1 has a privilege against P_2 that A_2 occur; P_1 has a duty to P_2 that A_3 occur. All three elements of each term must be specified in order for it to be meaningful.

These three terms can now be defined.

(1) P_1 has a right against P_2 that A_1 occur if and only if the non-occurrence of A_1 due to P_2 would result in P_2's

legal liability to P_1.[13]

(2) P_1 has a privilege against P_2 that A_2 occur if and only if the occurrence of A_2 due to P_1 would not result in P_1's legal liability to P_2.

(3) P_1 has a duty to P_2 that A_3 occur if and only if the non-occurrence of A_3 due to P_1 would result in P_1's legal liability to P_2.[14]

We can see from the definitions of "right" and "duty" that a duty is nothing more than a right with the parties reversed. Therefore, wherever there is a right there is a "correlative" duty, and wherever there is a duty there is a "correlative" right.[15]

The present law in the area of free speech can now be more precisely defined as a set of rights or privileges. In part, present law gives all citizens a certain privilege: all citizens have a privilege against government that they be able to communicate political messages (subject to various qualifications). This privilege means that a citizen's political communication will not result in any legal liability to any governmental organ. However, citizens have more than this privilege; they also have a corresponding "right that their privilege to do the thing not be interfered with" by government.[16] This right that a privilege not be interfered with by government is, according to the above defintion of "right;" the same thing as a right against government. This means, then, that any group of citizens have a right against government that there be no non-occurrence of its communication of political messages due to governmental behavior (again, subject to various qualifications).[17]

It is appropriate and accurate, then, to speak of a right (in the Hohfeldian sense) of free speech. Accordingly, in this paper the phrase "right of free speech" will be used instead of "freedom (or liberty) of speech."

So far "right" has been used here to refer to existing legal rights. In the context of normative theory it is also appropriate to use "right" in substantially the same sense whenever "right" is used to refer to legal rights which ought to exist. The change of context from existing legal rights to legal rights which ought to exist does not change the definition of "right." Thus, in a normative theory of law, "right" may retain its Hohfeldian meaning. Whether the normative theory is itself correctly based on moral (non-legal) rights is a question which is not dealt with here.

PART II: THE DEMOCRACY PRINCIPLE AND THE RIGHT OF FREE SPEECH

A. The Democracy Principle

It is assumed in this paper that the ideal form of society is democracy. I will not attempt to justify this assumption or to relate it to any ethical theories or theories of justice.[18]

Secondly, it is assumed that the "democracy principle," presented below, adequately states the most basic feature of democracy. The democracy principle is thus postulated as the essence of democracy. Since this principle is presented as a statement of the essence of society which should exist, it is, for the purposes of this paper, the starting point for a normative theory of society.

Although the democracy principle is the starting point and the basis of the normative theory presented here, it should be kept in mind that a primary purpose of this paper is to illustrate the proposition that a normative theory of society is necessary for the development of an adequate normative theory of free speech. A second purpose is to suggest that the particular normative theory of society which I have postulated here is correct and to argue that the theory of free speech presented here follows from that theory of society.

Here then is the principle upon which the arguments in this paper are based.

The democracy principle: (1) The powers of government legitimately exist only insofar as the citizens under that government

delegate those powers to it, (2) in such a way that the powers of delegation are equally distributed among the citizens.

The two components of this principle, (1) the delegation component and (2) the equal powers component, will be examined below.

Although a normative theory presents what ought to be, not what is, or what has been, it is generally helpful to understand some of the historical background of the theory. The democracy principle expresses two of the basic components of democracy expressed in the Declaration of Independence. In the Declaration, the delegation component is expressed in the phrase, "governments are instituted among men, deriving their just powers from the consent of the governed," and the equal powers component is expressed in the phrase, "all men are created equal." The democracy principle does not, however, express all of the points of the Declaration nor does it express the two components in exactly the same way. It may be debated, of course, what are the necessary and sufficient components of democracy.[19]

Although the democracy principle can be clarified by examining the two components separately, the full meaning of this principle cannot be understood without understanding how the two components interact with and limit each other. There is nothing explicit in the democracy principle indicating the relative weights to be given to the two components or whether one component must be satisfied before the other comes into play. Therefore there must be a third component of the democracy principle which states the principle of how the first two are to be related. This third

component, which I will also postulate, is that the first two components are of equal weight. Neither has priority over the other.

The first component establishes the legitimate source of government power and one of the two primary limitations upon that power. The power of government resides in the citizenry, and that power is legitimately sustained only insofar as that power is continually delegated by the citizenry to the government. This may occur by direct citizen participation in the decisions of government or by the direct selection by the citizens of representatives who make those decisions. The limitation on the power of government is that it may not extend beyond what has been delegated to it. The extent to which government exercises powers not delegated to it is the extent to which that government acts illegitimately.

The second component establishes the primary manner in which the delegation component is to be exercised. The powers of delegation are to be equally distributed among the citizenry. This means that no citizen has significantly more or significantly less power to determine the decisions of government than any other citizen. This component also establishes the second major limitation on the power of government. Government power may not be legitimately used to give some citizens a greater power of delegation than others. It may not alter the equal distribution of the powers of delegation.

It is reasonable to assume that in a large, complex society the preservation of the equal distribution of delegatory powers

can be adequately achieved only through governmental protection of that equality. Thus, as a practical matter, the second component also prescribes to government the responsibility for protecting the equal distribution of the delegatory power. In other words, it may be fairly assumed that the citizenry would delegate this power to the government in order to preserve and protect the equality of the delegatory power. Where the delegatory power is exercised through elections, for example, the government cannot allow one group of citizens to prevent another group from voting. There must be governmental protection of the voting process so that anyone who wishes to vote is not discouraged from doing so. This is one of the ways in which the two components interact. The second component can be preserved as a practical matter only through the delegation of that power of preservation, by means of the first component, to the government.

There is additional interaction. The second component limits the delegatory power of the citizenry. The citizenry may not delegate to the government the power to unequalize the delegatory powers. If, for example, the first component operates as a practical matter through majority rule, the majority may never take away any of the delegatory power of the minority (not, that is, without making the democracy principle ineffective). The second component thus acts as a limit on the power of the majority.

A third interaction is that the scope of equality in the second component is determined by the functioning of the first component in this way. The notion of equality in the second component does not assert that all people are to be equal in all

things or that all powers, rights and privileges are to be equally distributed. What is to be equally distributed is the power of delegation and, by implication, anything which would directly affect that power. Other equalities are not implied or required. There would be no conflict with the democracy principle if the citizenry chose to extend equalities beyond the essential ones required to preserve the equality of the power of delegation, but these would be additional equalities, permitted but not necessitated by the democracy principle.

This distinction between essential equalities and additional equalities corresponds to a distinction between basic rights and other rights. When the citizenry delegates power to the government to set up a legal system to preserve the functioning of the democracy principle itself, the citizenry obtains certain rights against the government that the government correctly carry out its mission. These are the rights of the citizenry against the government that there occur a continued functioning of the democracy principle. These rights are the citizens' basic rights. The government has the correlative basic duty to the citizenry that the democracy principle function.

The citizenry may obtain other rights in addition to the basic rights by requiring the government to establish laws providing for them. This the citizenry can always do through the exercise of its delegatory power. These additional rights would undoubtably be deemed by the citizenry to be important ones, so I will refer to these additional rights as "important rights" to distinguish them from basic rights.[20]

A thorough presentation of the democracy principle and its implications requires a complete determination of the rights that are basic. I will not attempt to present all of these rights here, but I will discuss the relation of such rights to the issue of free speech. A major thesis of this paper is that free speech is a basic right.

At this point it will be useful to clarify a little more of the democracy principle by showing some additional relationships between it and the Declaration of Independence. According to the Declaration, "[All] are endowed by their Creator with certain inalienable rights . . . . That, to secure these rights, governments are instituted among men . . . ." The notion that certain rights must be secured by government was assumed above. In a large society, the democracy principle cannot be preserved unless government seeks to preserve them. Whereas the Declaration proclaims that the rights to be secured are "inalienable," it is asserted here only that there are basic rights which must be preserved if the democracy principle is to function. Whether the democracy principle itself is endowed upon us by the Creator or by some other source is a question for which no answer is presented here.

I will now explore further the notion of basic rights, the rights which must be secured and preserved if the democracy principle is to function.

B. Voting Rights

Voting rights represent a paradigm of basic rights. Whenever the basic decisions of government or the selection of representatives to legislative bodies are made through an electoral process, the right of each citizen to vote and to have that vote weighed the same as every other vote is a right basic to the functioning of the democracy principle. Thus the electoral process is a practical means by which the citizens delegate their power to the government, and the principle of "one person, one vote" must be rigorously followed in order that the power of delegation be equally distributed among the citizens. Each citizen has, therefore, a right against the government that everyone within a district where an election is being held not be prevented from voting and that everyone's vote weigh the same as everyone else's.

This right must, if the democracy principle is to be secured, be more than a right that the government not interfere with the act and equal weighing of voting. It must include an affirmative duty on the part of government to set up the election machinery and to seek to remove any obstacle, whether from a governmental or from a non-governmental source, which might interfere with any citizen's desire to vote or which might alter the equal weighing of votes. Thus an employer may not prevent its employees from voting by requiring them to work during all voting hours. There must be a secret ballot, so that no one need fear that anyone would be subject to any injury whatsoever due to the way he or she voted. Where there are legislative representatives elected by geographically

determined districts, each district must contain close to the same number of people, unless there is a clear, sound and convincing reason for disproportionate representation, say, to help preserve a degree of regional autonomy.

Most of these concepts are not controversial today, but it was only a few years ago, in 1964, when the U.S. Supreme Court held that congressional districts of unequal size were unconstitutional,[21] and that the seats of state legislatures must be apportioned on a population basis.[22] Also a state-imposed obstacle to voting, the poll tax, was not abolished for state elections until 1966.[23] Although there are still areas of controversy -- for example, whether felons should have the right to vote -- the notions that democracy requires the removal of barriers to voting, and requires the weighing of each vote equally, have now been generally accepted.[24]

C. The Basic Right of Free Speech

I will now examine the notion of free speech and its relationship to the democracy principle. My procedure will be first to present a preliminary description of the right of free speech, then to examine some of the scope and limits of this right, and finally to show the relationship of this right to the democracy principle by examining its relationship to the basic right of voting.

The right of free speech has two components. The first

component is the right of the citizenry against the government that there occur no stifling by government of certain processes of communication. This component is the duty of government to not stifle certain communications among the citizens. It is a negative duty, in that it is a duty of government to refrain from acting in a way which prevents certain communications from occurring.

The second component is the right of the citizenry against the government that there occur no stifling by any nongovernmental forces of certain processes of communication among the citizens. This is an affirmative duty, in that it is a duty of government to act in a way which enables certain communications among the citizenry to occur.

It must be shown that the democracy principle requires some aspect of free speech to be a basic right, not just an important right, and that it requires both components of this basic right, that is, both the negative duty and the affirmative duty of government.

It is important to clarify the kind of speech which the democracy principle would require to be subject to treatment as a basic right. Since basic rights are those of the citizenry against the government that there occur a continued functioning of the democracy principle, a basic right of free speech would have to be concerned with whatever communication is necessary for that continued functioning. Not all communication, therefore, is a subject of this basic right. The basic right of free speech would concern only that communication which is necessary to ensure the continued delegation by the citizens of the powers of government, and to

ensure the equal distribution of that delegatory power among the citizens. Thus the basic right of free speech concerns only particular kinds of communications. The range of free speech which might be considered an important right would undoubtably extend beyond that considered a basic right.[25]

What distinguishes basic rights from important rights is not necessarily a difference in the nature of the government's duty. An important right might too require a corresponding positive duty on the part of government. What distinguishes them is their source and relative weight. The source of a basic right lies in the conditions necessary for the proper functioning of the democracy principle. The source of an important right lies in the citizenry's decision-making and delegatory power exercised while the democracy principle is properly functioning. Consequently, basic rights have priority over important rights, and any conflict which might arise between the two should always be resolved in favor of basic rights. This is because any abridgment or limitation of basic rights is also an abridgment or limitation of the democracy principle itself.

Since basic rights are necessary conditions for the functioning of the democracy principle, they cannot logically contradict any component or content of that principle. The second component of that principle requires that the delegatory powers be spread equally among the citizens. This means that basic rights must also be spread equally among the citizens, for an unequal distribution of those rights would conflict with the equal delegatory power. Basic rights, therefore, are equal rights. Important rights need not be equal rights, but whether equal or unequal they must not conflict

with equal basic rights.[26] Thus, to the extent that free speech is a basic right, it must be an equal right. The government's duty is to establish and maintain as an equal right that component of free speech which is a basic right.

An aspect of free speech which concerns basic rights is that which directly affects the electoral process. This aspect probably is the core of the basic right of free speech. It is this core which will be focused on in the remainder of this paper. Other aspects of the basic right of free speech may exist, but determining this would require development of this theory beyond what I will attempt here.

I will now examine further this core of the basic right of free speech. I will consider this core to be any speech which affects the voting process so that the equal right of voting is threatened or rendered ineffective to a significant degree. To show the importance of the connection between certain political expression and the electoral process, I will present a short scenario. The scenario is a rather extreme case, but its relationship to what we may have all experienced should not seem too obscure.[27]

This is the scenario:

Two candidates are running for the same office. The incumbent has retired. Candidate A has an absolute controlling interest in all of the major means of communication which reach her constituency. A owns 51% or more of the voting shares of the corporations which own the area's daily newspapers, radio and television stations. Because this ownership is divided among several corporations with different managements, anti trust actions and complaints to the Federal Communications Commission have so far been futile.

Nonetheless A's controlling interests in these corporations enables her to exercise an iron hand of control over the management. Polls have shown that 90% of her constitutents rely on one or more of these media outlets for nearly all of their news sources. These media outlets refuse to accept any paid political advertisements, and all political editorials pertaining to the election are confined to the newspapers. All news stories pertaining to the issues in the election are edited before publication or broadcast to present only that information which favors A's announced policies. A creates news stories for herself by making frequent press announcements and by having press conferences once a week. Candidate B also sends out press announcements, but they do not get printed or broadcast. B has tried to hold several press conferences, but only a reporter from a campus newspaper in a community 40 miles away and the editor of the weekly newsheet of a small local Unitarian Church have shown up.

A and B have equal access to the mails, however, and both send out numerous flyers to the constituency. B's flyers announce that A controls the local media. But through news stories and newspaper editorials, the local media refute these claims just before election day by presenting the facts that each media outlet is owned by a different corporation and that each has a different president, none of whom is A. The constitutents, not versed in corporate law, assume that the president of a corporation is the one who owns and controls it. Thus this refutation is effective and makes the constituents skeptical of B's other claims. B does not have the time to formulate and distribute a rebuttal by

election day.

A wins the election with 78% of the total vote. (The scenario ends.)

Now we would have been surprised indeed if the scenario had ended any other way. But what does this scenario have to do with the basic right of one person, one vote? Generally we assume that the principle of one person, one vote is one thing, and the campaign is another. My argument is that the campaign in this scenario so directly affected the voting process that the principle of one person, one vote was rendered ineffective. The democracy principle itself, therefore, was violated. The connection of the scenario to the democracy principle is this: That proportion of the constituency which would have voted for B had it known of the available information favoring B's position has been denied rational grounds for delegating a portion of their power of government to B.

The connection between denying one the vote and denying one a rational ground for voting for a particular candidate (or for a particular issue) can be made if we assume that a significant percentage of voters require a rational ground for voting a particular way in order to actually vote that way. This assumption does not require that we assume that this group of voters is motivated solely or even primarily by rational considerations. It requires only that we assume that a rational ground serves as a necessary condition to vote a particular way. Even many of those voters who make their voting decisions based primarily on nonrational factors require a rational ground as a necessary condition for a particular choice in order that the nonrational factors may come into play.

Thus to deny a rational ground for voting a particular choice is as effective as reducing the weight of the votes for that choice where the rational ground has not been denied. In either case, the principle of one person, one vote has been thrown askew.

This denial of rational ground is effective against the principle of one person, one vote whether or not the outcome of the election, in terms of who (or what) won and lost, would have been altered had the denial not occurred. This effect occurs for two reasons. When a candidate wins in a race between two main contenders by a close margin, that candidate is more likely to look favorably upon the policies advanced by the opposing candidate, and may actually act upon some of those policies in order to better secure the next election. Second, when the voting public is aware that the losing candidate advanced policies worthy of consideration, that candidate or a similarly oriented candidate has a good chance of winning the next election. Where a candidate's supporters, or would-be supporters, have been denied a rational ground for voting for that candidate, those supporters have less effect in influencing future governmental policies. They have been as effectively denied equal delegatory power as if each of their votes had counted for less than one.

There must exist, then, a basic right of free speech which would enable communications to occur which would protect the principle of one person, one vote, for where that principle has been adversely affected, so too has the democracy principle been adversely affected. There must be sufficient communication concerning the issues and views of candidates in any election to

prevent any person eligible to vote from being denied any available rational ground for voting any particular way.[28] This is the core of the basic right of free speech. This core is the basic right, and the equal right, of communication within the political arena. Because this basic right is an equal right, the basic right of political communication is a right shared equally by each citizen. The government's negative duty is to not restrict such communication where it occurs. Its positive duty is to make it possible for such communication to occur where it does not. A negative duty alone would be ineffective in the scenario, for nongovernmental forces have subverted the functioning of the democracy principle. The positive basic duty of government is to preserve that functioning, and when government does not fulfill its basic duty, the democracy principle cannot be expected to function.

This basic right has limits, and these limits must be understood so that arguments counter to the democracy principle do not become straw-person arguments.[29] The limits of the basic right of political communication can be derived from the purpose of that right. Its purpose is to give each person access to the available rational grounds for choosing any of the alternatives presented on the ballot. This does not require, for example, each citizen to have equal access to the media. Nor does it require that each opposing view receive exactly equal coverage. It does require that the available rational grounds be adequately presented so that no citizen is denied rational grounds for his or her decision. This means that each available rational ground must be presented with sufficient coverage so that no citizen who makes a reasonable effort

to hear or read is denied access to that ground. It does not necessarily mean that coverage of some issues beyond this minimum should be prohibited. Coverage beyond this minimum would be appropriate as long as coverage of certain sides of the debates does not effectively drown out the alternative views. Thus there is a minimum to be established, and a maximum to be established, but a range in between the minimum and the maximum in which differences may occur without serious effect on this basic right of political communication.

Additionally it should be kept in mind that the citizenry may establish important rights which are not in conflict with basic rights and which extend beyond the basic rights. Thus the limits upon the basic rights does not mean that beyond the area of basic rights is the area of no rights. Instead, beyond the area of basic rights is the area in which important rights may be established.

The completes the primarily theoretical presentation of the democracy principle and the basic right of free speech. Some further clarification of the theoretical presentation will result from working out its practical applications. But a complete working out of this theory will not be attempted here. My purpose is to lay a foundation, or the major substance of a foundation, but not to build the total structure.

In Part III which follows, I will examine some of the practical consequences of this theory by examining three cases which have been decided by the U.S. Supreme Court, Buckley v. Valeo,[30] Miami Herald Publishing Co. v. Tornillo,[31] and Police Department of Chicago v. Mosley.[32] The examination of these cases will reveal flaws and

and ambiguities in the Court's reasoning which must be corrected if any consistent theory is to be applied to First Amendment cases. I will attempt to show how these cases should have been decided based upon the democracy principle. I have intentionally not dealt with issues involving the discretionary powers of the Federal Communications Commission, for the relation of these discretionary powers to the democracy principle would require lengthy treatment.[33]

PART III: APPLICATIONS

A. Buckley v. Valeo and Campaign Expenditures

In Buckley v. Valeo the Court ruled on the constitutionality of the Federal Election Campaign Act of 1971, as amended in 1974. The purpose of the Act was to reduce or prevent the corruption and appearance of corruption resulting from undue influence on any elected officials by those who contribute or spend large sums of money to elect those officials.[34]

There were several key provisions of the Act which were at issue, but I will consider only one aspect of them here, the expenditure limitations.[35] The expenditure provisions (1) limited any individual or group of individuals to an expenditure of $1,000 "relative to a clearly identified candidate,"[36] (2) limited expenditures by candidates from personal or family resources to set amounts which varied from $50,000 for Presidential or Vice Presidential candidates to $25,000 for most candidates for the House of Representatives,[37] and (3) limited overall campaign expenditures to $10,000,000 for Presidential candidates seeking nomination and to an additional $20,000,000 for Presidential candidates seeking election to office.[38] These expenditure limitations were considered by the Court to be in violation of the First Amendment.[39]

The Court's treatment of the third expenditure limitation, the limitation on overall campaign expenditures, follows from its treatment of the first two limitations, the limitations on individual

expenditures by candidates on their own behalf or by others in behalf of candidates. Consequently my discussion will focus on these first two limitations on individual expenditures.

The Court viewed these individual expenditure limitations as limitations on the political speech of those individuals who desire and are able to spend above the Act's limits in disseminating their views. "The candidate, no less than any other person, has a First Amendment right to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election and the election of other candidates."[40] The Court's view may be summed up in three propositions: (1) Effective political speech costs money; (2) a governmental limit on the amount of money an individual may spend to disseminate his or her political speech is a limitation on the amount of that individual's speech; and (3) any governmental limitation on the amount of political speech an individual may make is violative of the First Amendment, unless that limitation can pass a strict scrutiny test.

These propositions seem straightforward and reasonable. They rest, however, on certain assumptions which are dubious and are also not consistent with the democracy principle. The Court assumes that the freedom protected by the First Amendment is (1) a freedom of individuals considered separately and (2) a freedom which consists in an absence of governmental restrictions.

The first assumption, that the First Amendment protects the freedom of speech of individuals considered separately, would lead the Court to conclude that any violation of the First Amendment can be determined by examining the effect of a restriction on any

single individual, without examining interactions among individuals. Thus, if a governmental restriction limits the speech of any individual A, then that restriction is suspect and subject to strict scrutiny. The fact that the unrestricted speech of individual A might effectively interfere with the speech of individual B, even when reasonable time, place and manner requirements are adhered to, is irrelevant to the nature of the restrictions, according to the Court. When the argument was presented to the Court that the government has a legitimate interest "in equalizing the relative ability of individuals and groups to influence the outcome of elections,"[41] the Court responded by saying that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."[42] Thus the Court explicitly rejects the idea that the government may legitimately seek, by means of restricting the speech of A, to maximize the total speech of A and B. Free speech, to the Court, does not mean a maximum possibility of speech for a group of individuals taken together, but only a maximum possibility of speech for any single individual considered separately.

The Court's second assumption, that freedom consists in the absence of governmental restrictions, is contained in its notion of "the marketplace of ideas." This marketplace is where there occurs the "unfettered interchange of ideas for bringing about of political and social change desired by the people."[43] The Court assumes that what makes this interchange "unfettered" is the absence of governmental restraints.

The two assumptions taken together produce the view that freedom of speech means a laissez faire system of individual speech enterprise. Even if we assume that laissez faire is workable as an economic theory, it does not follow that it is workable as a theory of political discussion. Ideas are not like goods to be bought and sold. A tangible product may be purchased by an individual, taken home and tested through use by that individual. A political idea, by its very nature, cannot be used or tested by an individual consumer acting alone. Its implementation is a social event, requiring the cooperation of large numbers of people. It is extremely difficult if not impossible for the same group of people to implement and test two competing and contradictory political ideas at the same time. Two competing tangible products can be tested at the same time. A poor product can be replaced by a competing product. Such easy replacement of an implemented political idea is not possible.

For other reasons, too, the marketplace analogy and reliance on laissez faire economic theory in the realm of free speech is simplistic and dubious. In the realm of speech, there are many areas where the speaker has a captive audience. An advertisement in the middle of a television program captures most of those viewing the program. An advertisement on a large billboard by a freeway captures most of those driving past. An advertisement in a bus captures those seated facing it.[44] Advertisements in unsolicited mail capture those who habitually open and read their mail. Unlike a product, which a consumer does not have to purchase once he or she sees it, an effectively communicated political idea can be

implanted in one who simply sees it. No exchange need take place. The idea that the marketplace of ideas consists primarily of exchange, like a consumer who exchanges money for goods, is simply false.[45] The application of laissez faire economic theory to freedom of speech is thus based on a faulty analogy between commodities and political ideas, and the fault in that analogy is not cured even if we assume that the theory is sound as applied to commodities.

If instead we base our theory of free speech on the democracy principle, a different analysis must be used concerning the expenditure limitations. The democracy principle requires a basic right of free speech, which is the equal right of each citizen to receive communications which express the available rational grounds for any ballot decision.[46] According to this theory, it is not unsound to limit the speech of some if this can be shown to be necessary to enable the overall communication of the available rational grounds to reach the level minimally adequate to reach all citizens who desire and make a reasonable effort to know them. What must be examined is not just whether the speech of an individual is limited, but whether a limit on the speech of one individual is effective in increasing the totality of the political communications relevant to ballot decisions. Where the wealth of a few is used to dominate the media with repeated messages so that the fewer messages of the less wealthy are effectively drowned out, the basic right of free speech not only permits the government to correct the imbalance where ballot issues are involved, but also it places upon government an affirmative duty to correct the imbalance.[47]

Some form of strict scrutiny test here would still be appropriate,

and governmental legislation should be required to meet the current tests regarding vagueness and over-breadth. I will not speculate as to whether these tests could have been passed in Buckley. The basic point is that the democracy principle would require the Court to make a very different analysis from the one it made. If we accept the democracy principle as our first premise, then the issue in Buckley would not be whether the government has restricted the speech of any individual, but whether the provisions of the Act are necessary to increase the overall speech relevant to ballot issues so that wealth concentrated in the hands of a few does not substantially interfere with the speech of the less wealthy.

Thus the Court's assumption that freedom of speech belongs to individuals considered separately but not in their interactions is contrary to the democracy principle which requires a basic right of free speech equally distributed among the citizens. Additionally, the Court's notion of the "marketplace of ideas" is based on a faulty analogy, and its idea that the only suppressor of freedom that need be feared is government is contrary to observable facts.[48]

B. Miami Herald Publishing Co. v. Tornillo and Right of Reply

Miami Herald involved the issue of whether "a state statute granting a political candidate a right to equal space to reply to criticism and attacks on his record by a newspaper violates the guarantees of a free press."[49] The Court unanimously found that

the statute was unconstitutional.

The Court did not ignore the good reasons advanced in favor of the statute; it presented these reasons in a clear and forthright manner. For example: "The First Amendment interest of the public in being informed is said to be in peril because the 'marketplace of ideas' is today a monopoly controlled by the owners of the market."[50] It quoted, albeit in a footnote, an argument by A. MacLeish favoring access: "Freedom of the press is a right belonging, like all rights in a democracy, to all the people. As a practical matter, however, it can be exercised only by those who have effective access to the press. Where financial, economic, and technological conditions limit such access to a small minority, the exercise of that right by that minority takes on fiduciary or quasi-fiduciary characteristics."[51] This argument supports the view that "the only effective way to insure fairness and accuracy and to provide for some accountability is for government to take affirmative action."[52]

The Florida statute at issue in Miami Herald was a "right of reply" statute designed to provide candidates for political offices with a remedy if local newspapers refuse to give a hearing to a candidate who had been subjected to press criticism.[53] A statute like this would be a minimum governmental duty following from the basic right of free speech under the democracy principle in any locality where a large number of citizens are served by a single daily newspaper or by newspapers under common ownership -- as is presently true for most localities in the United States including Florida.[54] The Florida right of reply statute would thus not only be permitted by the democracy principle, but also government would

be under an affirmative duty to write and enforce such statutes as a way of guaranteeing a basic right of free speech. But though this statute was wholly compatible with the democracy principle, the Court found that it was wholly incompatible with the First Amendment.

This incompatibility is the result of the Court's interpreting the First Amendment in basically the same way it interpreted it in Buckley. According to its interpretation, as discussed above, an infringement on freedom of speech or press occurs when any individual speaker is required by government to limit his or her expression. In Miami Herald, the Court viewed the Florida statute's requirement that an editor publish a reply as a restriction on that editor's speech. In part this view was based on the argument that editorial material can generally be added to a newspaper only if something else is omitted unless there is to be an increase in publishing costs.[55] But even if there were no additional publishing costs, according to the Court, government may simply not interfere at all in this area of editorial discretion.[56] "The choice of material to go into a newspaper, and the decisions made as to the limitations on the size and content of the paper, and treatment of public issues and public officials -- whether fair or unfair -- constitute the exercise of editorial control and judgment."[57] The editorial content of a newspaper, therefore, is within the realm of individual expression protected by the First Amendment.

This interpretation of the First Amendment which focuses on expression as primarily a matter of an individual's spoken or printed word would prevent the Court from approving of any action designed

to correct the control over communication presented in my scenario above. If we accept the Court's reasoning without qualification -- and the Court offered no qualification -- then a free press exists even if all newspapers, magazines, radio and television stations are owned by one person, as long as that person is not a government official or agent. The First Amendment contains no implicit or explicit antitrust provisions. Although antitrust laws which operate to prevent monopolization of the media may be consistent with the First Amendment, they are not required by it.[58] The First Amendment, on this interpretation, is a manifesto of free enterprise in the area of publications, even if that enterprise should over time result in total monopoly.[59]

The democracy principle requires a different interpretation of the First Amendment. The basic right of free speech protects certain communications which affect the political process. There cannot be individual monopoly of the media any more than the electoral process can be placed under the control of a single individual or corporation. Under the democracy principle, political communication is seen as a social, political process, as interactions among people for the purpose of changing or maintaining a social order. The totality of diverse speech in that process is the issue under the democracy principle. The issue is not, as the Court sees it, solely a matter of an individual's expression considered in isolation from that totality. The Florida statue reasonably sought to increase that totality of speech by placing a restriction on the discretion of individual newspaper editors or publishers. Therefore, the Florida statue in Miami Herald was in accord with

the democracy principle; the Court's opinion of that statute was not.[60]

C. Police Department of Chicago v. Mosley and the Content of Speech

My purpose in discussing Mosley along with a few other cases is to examine some of the Court's expressions of the principle that government under the First Amendment must be neutral with respect to the content of speech. The Court has frequently confused two different forms of the content-neutrality principle. Only one of these forms, the form which is apparently most consistent with Court behavior, is consistent with the right of free speech under the democracy principle. Understanding these two forms is necessary so that the democracy principle is not misunderstood or misinterpreted.

Both forms of the content-neutrality principle are present in Mosley. In that case the Court reaffirmed its frequently asserted view that the First Amendment means that the government must not be concerned with the content of expressed ideas. "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[61] An examination of this principle of content-neutrality reveals that it incorrectly states the Court's actual behavior. The problem lies in the ambiguous expression of the principle itself. The ambiguity can be dispelled only by making the logical point that there is a difference between the meaning of "content" and the meaning of "content alone."

In Mosley the Court held that a Chicago ordinance which prohibits

all picketing of any school, except when that school is "involved in a labor dispute," violates the Equal Protection Clause of the Fourteenth Amendment.[62] The Court's argument was that the ordinance prohibited some picketing but permitted others, whereby the distinction between the permitted and the prohibited picketing was based on the content of the messages being expressed. A holding of Mosley is that when a statute treats any two acts differently, where those acts directly involve "First Amendment interests," then that statute must be examined with strict scrutiny under the Equal Protection Clause.[63] Consequently the Court's discussion of the First Amendment was directly relevant to the issues in Mosley.

The Court's conclusion in Mosley is not at issue here, for it is not at odds with the democracy principle. The problem with the Court's opinion lies in its inconsistent statements of content-neutrality and in the consequences of such inconsistency for applying any First Amendment theory.

The Court's expression of the content-neutrality principle takes two basic forms. In one form the Court says, "The essence of this forbidden [government] censorship is content control." "Any restriction on expressive activity because of its content would completely undercut the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'"[64] In this form, governmental deviation from content-neutral regulations is "never permitted."[65]

In the second basic form, the Court says, "Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone."[66]

What distinguishes the two forms is that the first defines content-neutrality in terms of content, whereas the second form defines content-neutrality in terms of content alone. The simple logical distinction between "content" and "content alone" is what distinguishes the statement, "When you go to that restaurant, you must not wear your jeans," from the statement, "When you go to that restaurant, you must not wear your jeans alone." The first statement says you may not wear your jeans, obviously, and the ordinary meaning of the second is that you may wear your jeans if you wear them along with something else. Although both are statements of jeans prejudice, they are inconsistent in that both cannot be true at the same time.

The Court's expression of content-neutrality in terms of content (not content alone) is overbroad in that it overlaps in an inconsistent manner with the Court's obscenity doctrine (among other things).[67] As the Court has explicitly recognized, the distinction between protected speech and unprotected obscenity cannot be made without an examination of the content of speech.[68] Thus it is inadequate to say that content neutrality applies only to protected speech, for the very distinction between protected and unprotected speech depends on an examination and concern for content. Some contents are protected, some are not. There cannot be content-neutrality unless all contents are equally protected.[69]

The Court is apparently neutral, however, with respect to content alone. What removes obscenity from protected speech is not its content alone, but its content plus "contemporary community standards" defining it as obscene in certain forums.[70] According to the Court's "contemporary community standards" doctrine in

Miller v. California,[71] the Court does not remove obscenity from First Amendment protection solely by looking only at the content of the expression, but by looking at its content plus the circumstances of its expression. Speech becomes removed from First Amendment protection if its circumstances of expression include, for example, local standards defining it (with sufficient narrowness) as obscene and therefore as inappropriate for certain forums.[72]

My point here is not to argue that the Court's obscenity doctrine is sound. The distinction between neutrality based on content and neutrality based on content alone is a logical distinction only, and logical distinctions do not in themselves produce sound policies or principles. They can only make it possible to clarify statements and to reduce ambiguity. Whether a principle of neutrality based on content alone is sound depends on the extent to which the "plus" of "content plus" is defined in a principled manner. The point to notice here is that the Court is concerned with content only when there is an issue concerning the circumstances of its expression. Even in obscenity cases the Court is not concerned with the content alone.

The failure of the Court to explicitly distinguish content from content alone led it to offer unsound grounds for overruling Amalgamated Food Employees Union v. Logan Valley Plaza, Inc.[73] in Hudgens v. NLRB.[74] In Hudgens the Court held, inter alia, that employees did not have a right under the First Amendment to enter a privately owned shopping center to advertise their strike against an employer which had outlets in the center. In reaching this holding, the Court followed Lloyd Corp., LTD. v. Tanner[75] which held that persons who peacefully distributed handbills in a privately

owned shopping center announcing a meeting to protest the draft and the Vietnam war were not protected by the First Amendment. Quoting Mosley to support its view, the Court maintained that "the First and Fourteenth Amendments would not permit control of speech within such a center to depend upon the speech's content."[76] "It conversely follows, therefore, that if the respondents in the Lloyd case did not have a First Amendment right to enter that shopping center to distribute handbills concerning Vietnam, then the pickets in the present case did not have a First Amendment right to enter this shopping center for the purpose of advertising their strike against the Butler Shoe Co."[77]

To reach this result the Court felt it had to overrule Logan Valley. Logan Valley, decided four years before Lloyd, held that members of a union who peacefully picketed a business in a privately owned shopping center were protected by the First Amendment.[78] In overruling Logan Valley in Hudgens the Court maintained that Logan Valley and Lloyd were inconsistent (and that Lloyd should be followed).

The conclusion that Lloyd and Logan Valley are inconsistent is easy to accept if First Amendment protection is to be neutral with respect to content, as the Court maintained in Hudgens. But, as I argued above, the Court has already rejected content-neutrality in its obscenity cases. It is inconsistent of the Court to maintain content neutrality for the purpose of removing First Amendment protection from speech in private shopping centers and to reject content neutrality for the purpose of permitting states to remove First Amendment protection from obscenity.

But just as the Court's treatment of obscenity is actually

neutral only with respect to content alone, so can a sound distinction between Lloyd and Logan Valley be neutral with respect to content alone. In Lloyd the Court distinguished Lloyd from Logan Valley by pointing out that the picketing in Logan Valley was "directly related in its purpose to the use to which shopping center property was being put."[79] Thus, a private shopping center is an appropriate forum for advertising a labor dispute against an employer with retail facilities in the center, for the employer, by opening its premises to the public, subjects itself to public criticism concerning the nature of its operation.[80] In Lloyd, on the other hand, the political advertisements could have been readily distributed outside the shopping center with no significant loss in the impact of the message.

The distinction between Lloyd and Logan Valley can be maintained on the ground that though the First Amendment is not concerned with content alone, it is concerned with the content plus the appropriate forum of expression. The definition of "appropriate forum" in private shopping center cases would be based, following Logan Valley, on the relationship of the expression to the purposes for the center's existence. The First Amendment would remain neutral with respect to content alone, for the First Amendment protection would not depend on whether the messages were pro-union or anti-union, pro-war or anti-war. In this manner, the distinction between Lloyd and Logan Valley could be made in a principled way and be consistent with the principle of neutrality based on content alone.[81] In conclusion, therefore, the Court was inconsistent when it overruled Logan Valley on the grounds of neutrality based on content, for the First Amend-

ment is not neutral with respect to content according to the Court's obscenity doctrine.[82]

Continuation of the confusion between content plus and content alone would result in confusion about the meaning and application of the basic right of free speech under the democracy principle. This basic right would require that the government not be neutral with respect to content (though it would undoubtably require that it be neutral with respect to content alone). Under the democracy principle, the government has an affirmative duty to enable certain political communications to occur. Where there is a forum requiring diversity of expression, such as a discussion in the media of ballot issues, then the government must consider which messages are the most appropriate for maintaining the diversity of that forum. Where that diversity has been restricted beyond what is desirable for adequate communication of political issues, it is the affirmative duty of government under the democracy principle to act to remove those restrictions, whether those restrictions are imposed by a governmental agency or by private parties.

Thus under the democracy principle the government is not neutral with respect to the appropriate forum for political messages, and in determining the appropriateness of that forum it must look at the content of the messages. The principle underlying this procedure, if correctly understood, is not contrary to present Court doctrine as practiced. The Court is not neutral with respect to content, even though in Mosley and Hudgens it misled itself (and undoubtably others) to believe that it is. On this particular issue of neutrality with respect to content alone, and of non-neutrality

with respect to content, the basic right of free speech under the democracy principle does not require departure from the underlying present doctrine actually practiced by the Court. The particular application of this neutrality doctrine under the democracy principle, however, would vary from present Court doctrine as I have indicated.

CONCLUSION

Because a theory of free speech concerns individual expression and social communication in a society, and because speech, especially political speech, has social and political consequences, the theory cannot be adequately formulated without reference to a concept of the kind of society for which the theory is intended. What consequences of speech are desirable depends on the social and political structures desired to be achieved.

I have postulated the democracy principle as the basic premise of a desired society.[83] I have argued that a society based on this principle must contain a basic right of free speech distributed equally among its citizens. That right is intimately related to the goal that each citizen have an equal right to determine the nature and actions of government. The right is not a mere freedom from governmental interference, but is a right against government that government affirmatively act to establish and preserve the forums necessary for certain political forms of speech. The "speech" which is the subject of this right is political communication relevant to ballot issues. It involves a right to hear as well as a right of expression.

The democracy principle and the basic right of free speech have some practical consequences which differ from some of the consequences of First Amendment doctrine adopted by the Supreme Court. The theory of society which adequately explains with consistency

the various Court doctrines has not been formulated. Perhaps underlying the Court doctrines is another conception of society, perhaps of a society which too could be called democracy. But until such a conception has been formulated and made explicit, it cannot be examined and evaluated.[84]

I began this paper by saying that it raises more questions than it answers, and that too would make an appropriate ending. At most, this paper formulates a sound basis for a more complete theory. Perhaps, too, it formulates a basis for the development of alternative and competing theories. When such alternative theories are openly discussed and debated, we have a better chance of arriving at a clearer understanding of what kind of society we wish to achieve and of what rights and liberties are most crucial to protect.

NOTES

1. A. Meiklejohn, Free Speech and Its Relation to Self-Government, ch. 1 (1948).

2. Here I use the terminology of F. S. C. Northrop, The Logic of the Sciences and the Humanities, esp. 19-34 (1959). Also see note 5 below.

A normative theory is distinguished from a simple statement of what ought to be in that a theory presents a complex interrelationship of concepts derived from or based upon one or more explicit general principles.

3. On the disagreements concerning the justification, verification, or refutation of ethical theories, see, for example, P. Foot, ed., Theories of Ethics, esp. 1-15 (1967), and R. Brandt, ed., Value and Obligation, 249-431 (1961), and see the range of views contained in W. Sellars and J. Hospers, eds., Readings in Ethical Theory (1952).

4. F. S. C. Northrop, 20-21 (note 2).

5. Id., 21. The use of "normative" in this way is quite common in philosophy. For example: "The philosopher who constructs a system of normative ethics does not merely express the conventional moral code and moral reasoning of his own society. He is

searching for the true foundations of morality, which may or may not support his own society's code," P. Taylor, The Moral Judgment, xii (1963). (The distinction maintained by Taylor between normative ethics and "metaethics" has been disputed. See, for example, R. Abelson, Ethics and Metaethics, 6-7 (1963). Also C. S. Peirce maintains that there is a normative basis for all reasoning, Collected Papers, 5.130 [1960].)

A more complete discussion of the use of the term "normative" would distinguish at least three concepts: (1) A normative theory is a theory about what normative rules ought to be accepted; (2) a normative rule is a rule which prescribes what behavior ought to occur in a particular area of behavior (for example, an existing statute or rule of common law); (3) a social rule is a general description of what people believe about how people ought to behave. R. Dworkin, for example, distinguishes (2) from (3), Taking Rights Seriously, 19 and 48-58 (1978), though he sometimes uses "normative theory" to refer to a descriptive (non-normative) theory about existing normative rules (2), e.g. id., 67, and sometimes uses "normative political theory" to mean a normative theory (1), e.g. id., 68, and sometimes refers to normative theory (1) with the term "moral theory," e.g. id., 149. In this paper, to avoid such difficulties of usage, I use "normative theory" only in sense (1).

6. That a normative theory cannot be perfectly fulfilled in actuality is not a relevant objection to it as long as it can be increasingly fulfilled in the long run. For a discussion of the relation of the ideal of knowledge to practical attainment, see

C. S. Peirce (note 5), 5.405 - 5.508 and 5.565.

7. See, for example, the discussion of this point in J. Rawls, A Theory of Justice, § 38 (1971).

8. "The Supreme Court has neither embraced a unifying theory of the speech clause of the first amendment nor reached a consensus on appropriate premises for first amendment cases. An abundant first amendment literature has failed to dispel the climate of uncertainty and intellectual disorder that permeates the concept and implementation of freedom of speech. . . . A carefully articulated conception of the basic purposes of the amendment is essential to first amendment adjudication and commentary." L. BeVier, 30 Stan. L. Rev. 299, 299-300 (1978), footnotes omitted. Also, Thomas I. Emerson, Toward A General Theory of the First Amendment, esp. ch. 4 (1966).

For a more general treatment of the relevance of normative theory to law, see R. Dworkin (note 5, para. 2); for example: "Constitutional law can make no genuine advance until it isolates the problem of rights against the state and makes that problem part of its own agenda. That argues for a fusion of Constitutional law and moral theory, a connection that, incredibly, has yet to take place," 149.

9. For a discussion of the relationship between these two clauses, see First Nat. Bank of Boston v. Bellotti, 98 S. Ct. 1407, 1427-29 (1978), J. Burger concurring.

10. Meiklejohn, for example, discusses the First Amendment in terms of what people hear. Free Speech (note 1), 24-25.

11. "It is, of course, a commonplace that the constitutional

guarantee of free speech is a guarantee only against abridgment by government, federal or state," Hudgens v. N.L.R.B., 424 U.S. 507, 513 (1976), with the narrowly construed exception of the company town, id., 513-22, and Marsh v. Alabama, 326 U.S. 501 (1946).

The American Civil Liberties Union of Northern California was contesting this "state action" restriction on the right of freedom of association in Weintraub v. The Legal Clinic. "The ACLU is challenging his dismissal on the grounds that employees should not be forced to leave fundamental rights at home each day when they report for work." ACLU Foundation of Northern California 1979 Legal Docket, 1. However, this case was recently settled.

12. "A Review of Hohfeld's Fundamental Legal Concepts," 16 Clev-Mar. L. Rev., 559 (1967) and "Logical Analysis of Legal Doctrine," 53 Iowa L. Rev., 1209 (1968). See also the commentary of L. Allen, "Formalizing Hohfeldian Analysis to Clarify the Multiple Senses of 'Legal Right,'" 48 So. Cal. L. Rev., 428 (1974). The exact wording of the definitions which follow, however, are my own.

13. Although these definitions will suffice for the purposes of this paper, more extensive treatment is required for additional clarity. The phrase "would result in P_2's legal liability to P_1" means here "would result in P_2's legal liability to P_1 if the case were litigated and properly decided." But the meaning of "properly decided" requires further treatment, and that treatment would require deciding whether to adopt a "positivist" approach to law, like that of H. L. A. Hart, The Concept of Law (1961), an approach like that of R. Dworkin, Taking Rights Seriously (1978) or some other approach.

14. I believe these definitions are essentially equivalent to

those given in the Cullison articles (note 12). They differ from those given by Allen (note 12): for example, his definition of right is "x has a right that p shall be done by y," 439. The qualification that p "shall be done by y" results in a more restricted use of "right," and this more restricted use would interfere with the language simplifications discussed in note 17.

15. Compare these definitions with the definition of "liberty" given by Rawls (note 7), at 202. This definition of Rawls', though somewhat vague due to the use of "free" in it, appears to reduce liberties to privileges, though he wants liberties to involve rights and duties, at 239.

16. The quoted phrase is from Cullison, "Hohfeld's Fund. Legal Concepts" (note 12), 568.

17. "What people have in mind when they talk about the 'right' to do something is quite possibly what Hohfeld would also call a 'right,' but not what he would call a right to do the thing. Rather, they may have in mind what Hohfeld would call a right that their privilege to do the thing not be interfered with." Id., 568. But when we define rights and privileges not in terms of the right "to do the thing" but of the right against P that the thing occur, then the right against P that a privilege that something occur not be interfered with is the same thing as a right against P that the something occur. The definitions I've given, then, allow for a simplification of language without loss of analytic clarity. (In any case, it would still seem appropriate to use "right" as a short-hand expression for the cumbersome "right that a privilege not be interfered with," even if there is an occasional reason for

distinguishing between them.)

18. It would, of course, be instructive to compare the implications of the democracy principle given here with the implications of the basic principles of justice given by Rawls (note 7).

19. Reliance on the notion of the "consent of the governed" and on political equality lies at the basis of Meiklejohn's theory. Meiklejohn (note 1), 10-11, and Political Freedom, 93-94 (1960).

20. We should not assume that "basic rights" and "important rights," as distinguished here, correlate with "fundamental rights" and "important rights" as described in various Court opinions. See e.g. San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1 (1973).

21. Wesberry v. Sanders, 376 U.S. 1 (1964).

22. Reynolds v. Sims, 377 U.S. 533 (1964)

23. Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

24. But even in this area of voting the acceptance of equal rights has not been complete. For example, the Voting Rights Act of 1965, designed to eliminate racial and language discrimination in voting, has apparently not been adequately enforced. See Report of the Comptroller General of the United States: Voting Rights Act--Enforcement needs Strengthening, GGD-78-19, February 6, 1978. There are also continuing areas of legal controversy. See, for example, Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719 (1973).

The idea that employees should be guaranteed time off to vote without financial penalty has gained acceptance incompletely and

very slowly. In 1964 only 17 states had provisions permitting any eligible voter to take time off to vote in federal elections without being subject to a reduction of normal pay. Only 30 states had any provisions for time off for voting, and in 13 of these, various restrictions limited the right. U.S. Department of Labor, Time Off for Voting Under State Laws, Bulletin No. 138 (1964).

The role of governments in conducting elections was recently discussed in Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978): "[O]ur cases make it clear that the conduct of elections themselves is an exclusively public function. . . . The doctrine does not reach to all forms of private political activity, but encompasses only state-regulated elections or elections conducted by organizations which in practice produce 'the uncontested choice of public officials,'" at 158.

25. For example, speech considered obscene or pornographic would be subject to the basic right of free speech only where it is politically relevant. Whether it is included among the important rights of free speech (and how it is defined) would be subject to determination by the citizenry (directly or through its governmental representatives). To avoid infringement on basic rights, however, "political relevance" must be interpreted broadly, and doubts should be called in favor of extension of basic rights.

26. There is room to argue, for example, that an affirmative action program giving unequal opportunities to a discriminated against group concerns important rights so that the unequal distribution does not automatically conflict with the democracy principle.

27. Some real-life scenarios which provide some factual background for the following fictitious one are described in B. Schmidt, Jr., Freedom of the Press v. Public Access, 221-24 (1976); J. Barron, Freedom of the Press For Whom?, esp. 1-2, 13-15, 22-25 and 160-93 (1973); and R. Cirino, Don't Blame the People, esp. 278-307 (1971). Some factual data concerning concentration of ownership of the media nationwide are in B. Schmidt, Jr., 37-46. Also see note 53 below.

28. Some alteration of this idea may be necessary to make it administerable. For example, opposing candidates might be required to limit their "rational grounds" to 10 or 20 points and 500 or 1000 words. Also, the determination of what grounds are "rational" should be left up to the parties advocating a particular view and not left up to the government.

29. "The fallacy of the straw man consists in attacking (or defending) a position similar to but different from the one your opponent holds (or attacks)." H. Kahane, Logic and Contemporary Rhetoric, 33 (emphasis omitted) (1971). Also see R. Munson, The Way of Words, 289-92 (1976).

30. 424 U.S. 1 (1976).

31. 418 U.S. 241 (1974).

32. 408 U.S. 92 (1972).

33. For example, not examined are Columbia Broadcasting v. Democratic Comm., 412 U.S. 94 (1973) and FCC v. Midwest Video Corp., 99 S. Ct. 1435 (1979). The complicating issue is whether the discretionary power of the F.C.C. is compatible with the fulfillment of the government's affirmative basic duty of free speech.

Some of what is discretionary with the F.C.C. possibly should be required.

34. 424 U.S. 1, 25-26.

35. Id. at 39-54.

36. Id. at 39.

37. Id. at 51.

38. Id. at 54.

39. Although Buckley was a per curiam opinion, JJ. White and Marshall in separate opinions dissented from this part of the Court's opinion.

The Court upheld certain other provisions which limited the amounts a person or group could contribute to a candidate and to campaign committees. These contribution provisions were considered to concern association, not speech, so that they were subject to a lower test of constitutionality. It would seem that this broad definition of association narrows the definition of speech. See id. at 20-38.

40. Id. at 52.

41. Id. at 48.

42. Id. at 48-49. But see note 47 below.

43. Id. at 49.

44. This is discussed in Lehman v. City of Shaker Heights, 418 U.S. 298, 305-08 (1974), J. Douglas concurring.

45. J. Barron (note 27) also criticizes the marketplace idea, 320 ff. D. Lange's retort that Barron is too a "victim of the market-place myth" is not formulated with sufficient clarity to enable a clear response. "The Role of the Access Doctrine in the

Regulation of the Mass Media," 52 No. Car. L. Rev., 1, 8 (1973). The aspect of the "marketplace" notion which I am criticizing (and which Barron too criticizes) is that interchange of diverse ideas will occur if only the government will not interfere. The aspect of the marketplace notion which I accept (and which Barron too appears to accept) is that interchange of diverse ideas is desirable and produces the best results in the long run. It is simplistic to lump both aspects together under the label of "marketplace myth," as Lange seems to do.

Lange continued to criticize access notions on the idea that such notions conflict with what the founding fathers intended. Yet, curiously, he also criticizes the founding father approach as inadequate, at 12-14. Clearly one cannot have it both ways. Indeed, the idea that a theory of the First Amendment should rest on what the founding fathers intended would not take us very far. See L. Levy, Freedom of Speech and Press in Early American History, esp. xiii-xiv, xxi-xxviii and ch. 6 (1963) and Z. Chafee, "Book Review," 62 Harv. L. Rev. 891, 898 (1949).

46. See note 28 above.

47. I have not dealt with the issue of whether large expenditures in themselves corrupt or appear to corrupt the political process and thereby undermine public confidence in that process. (See, for example, J. White's opinion in Buckley, 424 U.S. 1, 257-66 [1976].) This issue goes to the question of whether the government's interest is sufficient to outweigh the Act's restrictions on speech. My analysis based on the democracy principle instead raises the question of whether the Act restricts speech or

enhances it.

48. In First Nat. Bank of Boston v. Bellotti, 98 S. Ct. 1407 (1978) the Court struck down a Massachusetts statute which prohibited any corporation from contributing to political campaigns or issues where the campaigns or issues do not materially affect the property or business assets of the corporation. Much of the Court's reasoning was based on Buckley. However, the Court called into question one of the premises of Buckley, that it is "wholly foreign to the First Amendment" for government to restrict some voices in order to enhance others, 424 U.S. 1, 48-49. Instead, in First Nat. Bank the Court found it relevant that "there has been no showing that the relative voice of corporations has been overwhelming or even significant in influencing referenda in Massachusetts." 98 S. Ct. 1407, 1423 (footnotes omitted). This suggests, contrary to Buckley, that the Court may consider the relative voices a factor in determining the validity of a governmental restriction. J. White in his dissent (joined by JJ. Brennan and Marshall) distinguishes Buckley on the grounds that the unfair advantage of corporations is the result of wealth amassed "as a result of special advantages extended by the State." Id. at 1433. But this distinction is shaky, for the wealth of individuals is also largely the result of special advantages (and disadvantages) extended by government through its tax laws.

49. 418 U.S. 241, 243. For a discussion of the factual background of Miami Herald see B. Schmidt, Jr. (note 27), 219-35.

50. 418 U.S. 241, 251. This point is amplified in B. Schmidt, Jr. (note 27), 37-46. For example he says, "[M]ost citizens in the

United States experience monopoly newspapers, a small number of television stations that are dominated by network programming, and a larger number of radio stations broadcasting largely interchangeable programs with a minimum of concern for public affairs," at 39. Also see Note, "Media Conglomerates, Antitrust Law, and the Marketplace of Ideas," 9 Mem. St. U. L. Rev. 257 (1979).

51. 418 U.S. 241, 251, n. 14.

52. Id. at 254.

53. Not only are most localities in Florida subject to a single daily newspaper, over 50% of the total daily newspaper circulation in Florida is of newspapers owned by five nationwide chains: Knight-Ridder, 18%; Tribune (which owns the Chicago Tribune), 12%; Gannett, 8%; Media General, 7%; and the New York Times Co. (which owns 6 Florida newspapers), 5%. I calculated these figures from data in the 1979 Editor and Publisher International Year Book.

54. See note 53; B. Schmidt, Jr. (note 27), 40; and B. Owen, Economics and Freedom of Expression, 78-79 (1975).

55. Id. at 256-57.

56. Id. at 258. Thus the Court's opinion would have remained the same even if the statute provided for reimbursement of additional costs. While such a reimbursement would not change the Court's opinion, it would meet a major objection stated by Lange (note 45), 70-71. Also see note 60.

57. 418 U.S. 241, 258.

58. Antitrust action has not been concerned with political and social effects of concentrated economic power but only with economic effects. See Note, "Media Conglomerates," (note 50 above),

278-79. Also, for a discussion of antitrust law and the First Amendment, see B. Schmidt, Jr. (note 27), 47-51.

59. J. White, in a concurring opinion, states, "According to our accepted jurisprudence, the First Amendment erects a virtually insurmountable barrier between government and the print media so far as government tampering, in advance of publication, with news and editorial content is concerned. . . . A newspaper or magazine is not a public utility subject to 'reasonable' government regulation in matters affecting the exercise of journalistic judgment as to what shall be printed." 418 U.S. 241, 259. This seems to be an accurate reflection of the Court's unanimous view. Such an "insurmountable barrier" would permit, were it not for antitrust laws themselves not required by the First Amendment, private monopolization of the media.

60. Probably the affirmative duty of government under the democracy principle would require the government to reimburse the additional costs of printing a reply. Also see note 56.

61. 408 U.S. 92, 95, and the cases cited there.

62. Id. at 92-93.

63. "Because Chicago treats some picketing differently from others, we analyze this ordinance in terms of the Equal Protection Clause of the Fourteenth Amendment. Of course, the equal protection claim in this case is closely intertwined with First Amendment interests." Id. at 94-95. "[J]ustifications for selective exclusions from the public forum must be carefully scrutinized." Id. at 98-99. "The Equal Protection Clause requires that statutes affecting First Amendment interests be narrowly tailored to their legitimate

objectives. Id. at 101.

64. Id. at 96. The omitted citation is to New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

65. 408 U.S. 92, 99.

66. Id. at 96. The Court did not further distinguish between the content of the message and its source. Arguably the Chicago ordinance at issue in Mosley distinguishes between different sources of messages by excepting from its prohibition messages directly resulting from a labor dispute (and without regard to the position taken in the messages). The same messages in the absence of a labor dispute would not have been subject to the exception. For my analysis here, however, it suffices to accept the Court's view of content as including the source, though a definition of "content alone," as discussed here, might exclude the source if the source can be successfully separated from the position taken in the messages.

67. J. Burger, in his concurring opinion, expressed reservations about the overbreadth of the Court's expressions. Id. at 103.

68. In Young v. American Mini Theatres, 427 U.S. 50 (1976), a plurality of the Court (per J. Stevens, joined by Ch. J. Burger and JJ's White and Rehnquist) said, "The question of whether speech is, or is not, protected by the First Amendment often depends on the content of the speech. Thus, the line between permissible advocacy and impermissible incitation to crime or violence depends, not merely on the setting in which the speech occurs, but also on exactly what the speaker had to say. Similarly, it is the content of the utterance that determines whether it is a protected epithet or an unprotected 'fighting comment,'" at 66. This plurality went

on to say that the degree of protection within protected speech may also depend on the content. The majority has rejected this latter view (concerning the degree of protection within protected speech), FCC v. Pacifica Foundation, 438 U.S. 726 at 761 (J. Powell concurring) and at 762-63 (J. Brennan, dissenting)(1978), but the former view (concerning the separation between protected and unprotected speech) has not been rejected, as far as I have been able to determine, by any member of the Court. For example, J. Powell has explicitly repudiated only the latter view and not the view quoted. Id. at 761, Mini Theatres at 73, n. 1, and Erznoznik v. Jacksonville, 422 U.S. 205, 208 and 212 (1975). Also JJ's Stewart, Brennan, Marshall and Blackmun have accepted the view that content neutrality does not apply "in the limited context of a captive or juvenile audience," Mini Theatres at 86. Also see Ginsberg v. New York, 390 U.S. 629, 634 and 637-43 (1968). (It also appears that JJ.'s Brennan and Marshall have accepted the view that the determination of "fighting words" also requires an examination of content. Pacifica Foundation at 763, J. Brennan dissenting.)

It is impossible, I believe, to maintain that any speech is unprotected, apart from speech in violation of those time, manner and place regulations which affect all speech, without examining the speech's content. Thus the obscenity which JJ.'s Stewart, Blackmun, Brennan and Marshall would most likely remove from protected speech, that which reaches minors and unconsenting adults, can only be defined by examining the content of speech.

69. It might be argued that the content-neutrality principles expressed in Mosley refer to the constitutional limits of govern-

mental restrictions, whereas the content-dependence principles of obscenity doctrine refer to the constitutional limits of governmental protection. But the distinction between governmental protection and governmental restriction has little practical significance to the speaker who is thwarted, whether by direct governmental restriction or by some other restriction due to the lack of governmental protection. If either is based on content alone, then the government is involved in regulating content alone. If there is to be either content neutrality or content-alone neutrality, this neutrality must, to be effective, be a factor in determining both governmental restrictions and governmental protection.

70. See Miller v. California, 413 U.S. 15, 36-37 (1973). There is, of course, an analogy of this distinction to that between speech and speech plus, e.g. United States v. O'Brien, 391 U.S. 367.

71. Id. at 36-37.

72. Arguably the Court only defers to local determinations based on content alone. But local standards typically restrict obscenity according to whom and where it is expressed--i.e., according to the circumstances of its expression. (Thus it would appear that the concept of regulation based on content-plus would overlap with the concept of time, place and manner regulations. The nature of this conceptual overlap is a matter for further examination.)

73. 391 U.S. 308 (1968).

74. 424 U.S. 507 (1976). The Court followed this overruling in Flagg Bros., Inc. v. Brooks, 436 U.S. 149 at 159 (1978).

75. 407 U.S. 551 (1972).

76. 424 U.S. 507, 520 (1976). Footnote omitted.

It is ironic that J. Marshall who wrote the opinion in Mosley dissented in Hudgens, and that Ch. J. Burger and J. Rehnquist, who joined Part IV-B of J. Steven's opinion in FCC v. Pacifica Foundation, 438 U.S. 726, proclaiming that governmental regulation need not be content neutral, joined the Court's opinion in Hudgens. None of these justices explained these apparent divergences in these opinions.

It is also ironic that the result of Hudgens, in following the content neutrality principles of Mosley, is to make the permission of speech in privately owned shopping centers totally dependent on the owner's view of that speech's content. (Also see note 69 below.)

77. 424 U.S. 507, 520-21 (1976).

78. J. White, concurring in Hudgens, thought that Logan Valley need not be overruled to reach the result in Hudgens. Id. at 524-25.

79. 407 U.S. 551, 560, quoting Logan Valley at 391 U.S. 308, 320 n. 9.

80. Here I am stating what appears to me to be the Court's view in Logan Valley and Lloyd.

81. In Mosley the speech occurred on the public sidewalks, so there was no adequate ground for arguing that this forum favored some types of speech over others. Please note that I am not arguing that the forum restriction on expression maintained in Lloyd was consistent with the democracy principle. The opposite is probably the case.

The apparent inconsistency between Lloyd v. Tanner and Mosley led K. Karst to remark, "[A] labor-picketing exception in an ordinance is unconstitutional, but in a 'private' shopping center a labor-picketing exception is constitutionally required." "Equality as a Central Principle in the First Amendment," 43 U. of Chi. L. Rev. 20, 41 (1975). A distinction between these two cases can be maintained in a principled way only by discussing the "plus" factor--the nature of the forum.

82. This same distinction between content plus and content alone is necessary to make consistent two otherwise inconsistent statements within the Mosley opinion. On the one hand, the Court states that government is "never permitted" to describe permissible and impermissible speech in terms of its "subject matter," 408 U.S. 92, 99, but on the other hand it says that "conflicting demands on the same place may compel the state to make choices among potential users and uses," id. at 98 (presumably a reference to Red Lion Broadcasting Co. v. FCC, 397 U.S. 367 [1969]). It is difficult to see how a choice among "users and uses" could be made without some reference to the content (or "subject matter") of the messages.

83. It could be argued that deriving concepts of rights from a concept of society does not or cannot adequately define the rights of individuals against the state. Whether this is so would depend on the results of further development of the theory. The value of individual self-fulfillment, for example, might not be adequately supported by a theory of society. See T. Emerson (note 8), ch. 1.

84. See note 8 and the second paragraph of note 45.